NO. 14-2-02796-0

COURT OF APPEALS,
DIVISION II

OF THE STATE OF WASHINGTON

48206-T-II

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REYMUNDO FELIPE, *APPELLANT,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *RESPONDENT.*

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# APPELLANT'S REPLY BRIEF

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## ARGUMENT

The statement in the decided cases that a change in condition to reopen a claim for aggravation may not be predicated upon the testimony of a physician who forms his or her opinion from subjective symptoms alone, must be considered in connection with the peculiar facts of each case. The Industrial Insurance Act is remedial in nature and the beneficial purposes should be liberally considered in favor of the injured worker. The cases relied upon for the rule that an industrial insurance claim cannot be reopened for a change in conditions upon the testimony of a physician who bases his opinion entirely upon subjective symptoms means no more than this: a case may not be reopened if the physician's opinion is based solely upon what the worker related. If on the other hand, the injured worker's complaints can be verified by the symptoms disclosed by the physician's clinical examination, all the requirements of proof have been met. *Wilber v. Dep't. of Labor & Indus.*, 61 Wn.2d 439, 445-446, 378 P.2d 684 (1963).

The issue in this appeal is when a worker has a closed head injury that produces a post concussion syndrome with symptoms of headache pain, dizziness and memory loss which subside by the date of claim closure, do you need objective findings of symptoms to reopen a claim for aggravation when those symptoms worsen following claim closure? The appellant,

Reymundo Felipe, argues that you do not, and the respondent, Department of Labor and Industries, argues that you do. Mr. Felipe's treating physician, Jon Sukachevin, MD, filed an application to reopen Mr. Felipe's claim for aggravation, received by the Department on November 6, 2012. There was a magnetic resonance imaging, MRI, performed on November 17, 2012, which was only suspicious for a remote small hemorrhage, as described by William Stump, MD, the employer's examining physician. When Dr. Stump examined Mr. Felipe on January 23, 2013, for persistent pain on the top of his head, he could not identify any neurological deficit. Dr. Stump did testify that symptoms of headache, dizziness and memory loss are typical of a closed head injury with concussion, but he thought that they should have resolved within 3 to 6 months following the industrial injury of April 19, 2011.

On the application to reopen the claim for aggravation dated October 24, 2012, Dr. Sukachevin stated Mr. Felipe's current symptoms to be headache, dizziness, memory loss problems, fatigue and depression. To question 4A, what would suggest measurable worsening of the industrial injury since claim closure, Dr. Sukachevin states that his headaches were worse and his dizziness persistent with uncontrolled depression, fatigue and memory loss. (CABP, Dr. Sukachevin - Direct, page 25, line 6). On cross

examination, Dr. Sukachevin acknowledged that there would be no objective findings to support reopening:

> Q. And in paragraph 4A what, under your definition of "objective," would you have listed in there? I mean, you say –
>
> A. The uncontrolled depression is kind of interesting because the – usually for depression you do base it on symptoms, you know. So you know, in psychiatry it's – it is – they do rely on history.
>
> Q. For instance, you write "worse headaches." That would not be an objective finding, would it? That would be the subjective complaints of the –
>
> A. Oh, right, because of the – yeah. I would be more how the – it would be subjective, how the patient feels, yes.
>
> Q: And then you say after that, it looks like – and I'm not sure what that word is.
>
> A: Oh, "dizziness."
>
> Q: And dizziness, that would also be a subjective complaint of the patient, correct?
>
> A: Yeah. I mean, on neurologic exam you could corroborate it, I suppose.
>
> Q: Did you corroborate it?
>
> A: His gait was normal on that day, on my neurologic exam on October 24, 2012.
>
> Q: So it was not corroborated, then.
>
> A: Not based on exam.

Q: Okay. Then you have after that – what's the next word there?

A: "Uncontrolled depression." Oh. "With persistent and uncontrolled depression."

Q: Persistent and uncontrolled depression?

A: Uh-huh.

Q: Then fatigue, is that what it says?

A: Uh-huh, fatigue.

Q: That's also a subjective complaint, is it not?

A: Uh-huh.

Q: And then "memory problems," is that what it says next?

A: Right.

Q: And again that's a subjective complaint?

A: Yes.

(CABR, Dr. Sukachevin - Cross, page 37, line 8, through page 38, line 23).

What is significant about *Price v. Dep't. of Labor and Indus.*, 101 Wn.2d 520, 523, 682 P.2d 307 (1984), is that Ms. Price's experts testified that the pain that she felt was real, though perhaps partly of psychological origin, and would affect her ability to work to the same extent as if there were objective findings that fully explained the pain. Whereas, the Department's experts testified that Price's pain was caused largely by

psychological factors. The Note on Use quoted by *Price* from WPI 155.09, question No. 14 here, stated:

> This instruction may not be proper in instances of mental, emotional, post concussion syndrome, loss of hearing and loss of sight cases, because these conditions may not have objective findings present.

*Price v. Dep't. of Labor & Indus.,* 101 Wn.2d at page 525. The same Note of Use appears in the current edition of Washington Pattern Instructions, though now citing *Price v. Dep't. of Labor & Indus.*

*In re Charles Lewis,* BIIA Dec, 07 16483 (2008), relied on *Price v. Dep't. of Labor & Indus.*, and *Wilber v. Dept. of Labor & Indus.* In circumstances where the status of the injury cannot have an objective measure, the Board of Industrial Insurance Appeals relies on that line of cases. Their analysis in deciding that erectile dysfunction falls within that line of cases was that there are some conditions that cannot be measured by the independent observation of a physician, and when that is the case, it is error to make reopening dependent on the presence of objective findings. In those cases the worker's subjective report of worsening coupled with the physician's opinion, which provides reliability for the worker's report, is sufficient. If it were otherwise, some injured workers would be unable to reopen their claim, even though their condition had in fact worsened, which

is contrary to the Workers Compensation Act, quoting from *Wilber v. Dep't. of Labor & Indus.*, 61 Wn.2d at page 444.

Contrary to the footnote of page 14, of the Brief of Respondent, *In re Charles Lewis* is consistent with *Price* and *Wilber*. *In re Charles Lewis,* BIIA Dec, 07 16483 (2008), is a significant decision of the Board of Industrial Insurance Appeals. RCW 51.52.160 provides that the Board shall publish significant decisions, and WAC 263-17-195 (1) provides that significant decisions are considered to have an analysis or decision of substantial importance to the Board. While the Board's interpretation of the Industrial Insurance Act is not binding upon the court, it is entitled to great difference. *Romo v. Dep't. of Labor & Indus.*, 92 Wn. App. 348, 356, 962 P.2d 844 (1996), *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 679 (1991)

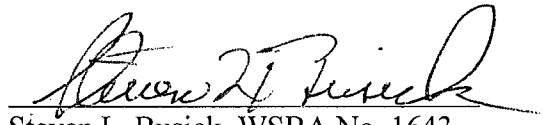
What was unique about Dr. Sukachevin's position was that he examined Mr. Felipe both before and after claim closure on May 9, 2012. Dr. Sukachevin saw Mr. Felipe on November 2, 2011, for headache, memory loss, and depression. Dr. Sukachevin saw Mr. Felipe back on October 24, 2012, and Dr. Sukachevin documented that his headaches were previously a 4 out of 10 in intensity and now were 9 out of 10 in intensity. His headaches were now ongoing daily, as many as 4 per day, and

Mr. Felipe was afraid to drive. Dr. Sukachevin diagnosed traumatic brain injury related to the injury of April 19, 2012, and filed the application to reopen the claim for aggravation. Dr. Sukachevin could not document any objective finding of worsening except for the MRI, which was only consistent with a small hemorrhage in the brain, and was possibly not picked up by the CAT scan without contrast at the time of injury. (CABR, Dr. Sukachevin - Direct, page 27, lines 17).

## CONCLUSION

The trial court erred in giving instruction No. 14 to the jury requiring objective findings to reopen a claim for aggravation, when due to the nature of the injury, namely a traumatic brain injury, objective findings could not be documented.

Dated: April 28, 2016



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SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

| | |
|---|---|
| REYMUNDO FELIPE,<br><br>Plaintiff,<br><br>v.<br><br>DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON<br><br>Respondent. | No. 14-2-02796-0<br><br>PROOF OF SERVICE |

The undersigned states that on Thursday, the 28th day of April, 2016, I deposited in the United States Mail, with proper postage prepaid, Appellant's Reply Brief, Appendix A, and Proof of Service, addressed as follows:

Dane Henager, Assistant Attorney General
Attorney General of Washington
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

April 28, 2016, Vancouver, WA

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

| | |
|---|---|
| IN RE: CHARLES R. LEWIS | ) DOCKET NO. 07 16483 |
| | ) |
| CLAIM NO. M-570914 | ) DECISION AND ORDER |

APPEARANCES:

Claimant, Charles R. Lewis, by
Calbom & Schwab, P.S.C., per
G. Joe Schwab and Bryce P. McPartland

Employer, Aalbu Brothers of Everett, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
M. Ann McIntosh, Assistant

The claimant, Charles R. Lewis, filed an appeal with the Board of Industrial Insurance Appeals on June 14, 2007, from an order of the Department of Labor and Industries dated June 5, 2007. In this order, the Department affirmed its prior order dated June 28, 2006, in which the Department denied the claimant's application to reopen the claim. The Department order is **REVERSED AND REMANDED.**

## DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on July 9, 2008, in which the industrial appeals judge affirmed the order of the Department dated June 5, 2007, in which the Department denied the claimant's application to reopen his claim. The basis for the decision was that worsening of the condition for which treatment was sought was not evidenced by objective findings.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The question before us is whether objective findings are necessary if there is no way to measure and objectively quantify the status of the condition alleged to have worsened. We believe the answer is no. To hold otherwise would make it impossible for an injured worker in that circumstance to reopen a claim.

Mr. Lewis was injured in 1993 when a fly wheel broke apart and he was struck in the groin by debris. The injury was the proximate cause of a condition diagnosed as Peyronie's Disease,

which is a scarring of the inside lining of the penis. The result is poor blood flow and eventually, erectile dysfunction. Jeffrey M. Monda, M.D., is the claimant's treating physician. Dr. Monda was the only medical expert called to testify in this appeal. His explanation that the condition is progressive, with no way to objectively measure the progression of the disease, is unrebutted.

Mr. Lewis testified that erectile dysfunction did not develop immediately, and when it did develop, it could be alleviated with medication. That was the status of his condition when the last closing order was issued on September 13, 2003, with an award for permanent partial disability. As time passed, the medication became less and less effective, so that for the period of September 13, 2003, to June 5, 2007, the period relevant to this appeal, his condition had deteriorated from one that got some relief with the use of medication to one where medication was of no help. The treatment that is available for him now is surgical intervention.

RCW 51.32.160, which is commonly referred to as the aggravation statute, does not require a showing of objective findings in order to reopen a claim.[1] The requirement that medical testimony of worsening be supported by at least one objective finding comes from a line of Washington cases and is set out in WPI 155.09 Extent of Disability or Aggravation--Basis of Medical Opinion. See, *Dinnis v. Department of Labor and Indus.*, 67 Wn.2d 654 (1965).

But in the circumstance where the status of the injury cannot have an objective measure, we rely on another line of cases in holding that the condition is nevertheless compensable. See, *Price v. Department Labor and Indus.*, 101 Wn.2d 520, 682 P.2d 307 (1984); *Wilber v. Department of Labor and Indus.*, 61 Wn.2d 439, 378 P.2d 684 (1963); *Parks v. Department of Labor and Indus.*, 46 Wn.2d 895, 286 P.2d 104 (1955); and *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 603 P.2d 1262 (1979).

In *Price,* the injured worker applied to reopen her claim based upon her perception of a substantial increase in pain. It was agreed that the pain was at least partly psychological in origin, and manifested itself largely, if not entirely, in ways not measurable by objective tests.

The issue before the *Price* court was whether it was proper to instruct the jury that a physician cannot rely solely on subjective complaints but must have at least one objective finding

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[1] (1)(a) If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under RCW 51.36.010. The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

as a basis for his opinion that a condition had worsened (WPI 155.09).[2] The Court held that it was not proper to instruct the jury on the objective subjective distinction in a case involving psychiatric disabilities.

The reasoning of the Court in this line of cases is apparent. There are some conditions that cannot be measured by the independent observation of a physician and where that is the case, it is error to make reopening dependent on the presence of objective findings. In those cases, the worker's subjective report of worsening coupled with a physician's opinion, which provides reliability for the worker's report, is sufficient. If it were otherwise, some injured workers would be unable to reopen their claim even though their condition had, in fact, worsened. We do not believe that is within the contemplation of the Workers' Compensation Act.

In *Wilber*, the Court stated:

> The industrial insurance act, from its inception, has authorized a reopening of a case if an increase in the disability occurred or was discovered after closure. Laws of 1911, chapter 74, § 5(h) (presently codified as RCW 51.32.160) provided:
>
> If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.
>
> The purpose of this section was explained by the United States Supreme Court in *Gange Lbr. Co. v. Rowley*, 326 U. S. 295, 306, note 15, 90 L. Ed. 85, 66 S. Ct. 125, as follows:
>
> It was exactly to prevent such rigid finality that the statute preserved both the Department's unlimited power to reopen the case and the employee's power to have it reopened as a matter of right during the limited period. From the beginning, the Act seems to have been drawn to avoid the crystallizing effects of the doctrine of *res judicata* in relation to awards, whether as against the employer or the employee. The idea apparently was that the initial award for an injury would afford compensation for harms then apparent and proved. But it was recognized, on the one hand, that all harmful consequences might not have become apparent at that time and, on the other, that harms then shown to exist might later be terminated or minimized. Cf. *Choctaw Portland Cement Co. v. Lamb*, 79 Okla. 109, 110, 189 P. 750. The purpose of the provisions for reopening, whether at the instance of

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[2] Even then, the Note on Use to that instruction was: "This instruction may not be proper in instances of mental, emotional, post concussion syndrome, loss of hearing and loss of sight cases, because these conditions may not have objective findings present."

the employer, the employee, or the Department, cf. notes 5 and 14, obviously was to prevent the initial award from finally cutting off power to take account of these later frequent developments. It was to maintain a mobile system, capable of adapting the amount of compensation from time to time in accordance with the facts relating to the injurious consequences for disability as they actually develop, not to cut off rigidly the power either to increase or to decrease the compensation once an award had become 'final' for purposes of appeal.

. . . .

[1] The statement in the decided cases, that a change in condition may not be predicated upon the testimony of a physician who forms his opinion from subjective symptoms alone, must be taken in connection with the peculiar facts of each case.

In considering such statements made in the course of judicial reasoning, one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.

*Wilbur*, at 444. (Citations omitted)

That reasoning must be applied to this case. The condition that Mr. Lewis suffers from as a result of the industrial injury does not have objective criteria to measure worsening but he has demonstrated worsening nevertheless and is entitled to have his claim reopened.

The Department order dated June 5, 2007, is reversed and the claim remanded with direction to reopen the claim, and provide the claimant with proper and necessary treatment and such other benefits as required by the law and the facts.

## FINDINGS OF FACT

1. The claimant, Charles R. Lewis, filed an Application for Benefits with the Department of Labor and Industries, within one year of the injury to his groin, in which he alleged an injury occurred on May 13, 1993, during the course of his employment with Aalbu Brothers of Everett, Inc.

On July 7, 1993, the Department issued an order in which it allowed and closed the claim.

On April 7, 1995, the Department issued an order, in which it allowed the claimant's December 2, 1994 application to reopen the claim. On December 3, 1997, the Department closed the claim with an award for permanent partial disability.

On November 29, 2000, the Department issued an order, which allowed the claimant's October 27, 2000 application to reopen the claim. On July 23, 2002, the Department closed the claim with no additional award for permanent partial disability. On September 18, 2003, following the claimant's protest, the Department affirmed the July 23, 2002 order.

On March 13, 2006, the claimant filed an application to reopen his claim. On June 28, 2006, following the issuance of a Department order dated June 2, 2006, that extended the Department's decision period to August 10, 2006, the Department denied the claimant's application on the basis that the condition had not worsened since final claim closure.

On June 5, 2007, following the claimant's July 14, 2006 Protest and Request for Reconsideration, the Department affirmed its order dated June 28, 2006.

On June 14, 2007, the claimant filed a Notice of Appeal from the June 5, 2007 order with the Board of Industrial Insurance Appeals. On July 10, 2007, the Board issued an Order Granting Appeal and assigned the appeal Docket No. 07 16483.

2. On May 13, 1993, the claimant sustained an injury during the course of his employment with Aalbu Brothers of Everett, Inc., when a grinding wheel broke apart and he was struck by debris. The industrial injury was the proximate cause of a condition diagnosed as Peyronie's Disease.

3. Peyronie's Disease results in progressively worsening erectile dysfunction. There is no method available to objectively measure the condition.

4. As of September 18, 2003, the condition of erectile dysfunction had resulted in a permanent impairment equal to 10 percent of total bodily impairment but could be alleviated with the use of medication.

5. Between September 13, 2003, and June 5, 2007, the condition of erectile dysfunction progressively worsened as evidenced by the claimant's report that medication no longer provided any relief.

6. As of June 5, 2007, the claimant's condition was in need of proper and necessary surgical treatment.

## CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Between September 18, 2003, and June 5, 2007, the claimant's condition proximately caused by the industrial injury of May 13, 1993, worsened within the meaning of RCW 51.32.160.

3. As of June 5, 2007, the claimant was in need of treatment within the meaning of RCW 51.32.010.

4. The Department order dated June 5, 2007, in which the Department affirmed its order dated June 28, 2006, and denied the claimant's application to reopen the claim, is incorrect and is reversed. The claim is remanded to the Department with direction to reopen the claim,

provide the claimant with proper and necessary medical treatment, and take such other action as required by the law and the facts.

It is **ORDERED**.

Dated: October 10, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member